

**FILED**

No. 03-70244

OCT 25 2004

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Jaime Perez-Enriquez,  
Petitioner/Appellee  
v.  
John Ashcroft, Attorney General  
Respondent/Appellant

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PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

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BRIEF OF PETITIONER IN SUPPORT OF  
MOTION FOR RECONSIDERATION AND REHEARING EN BANC

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## NOTICE OF SUBSTITUTION OF COUNSEL

Petitioner notifies this Court that the law offices of Gibbs Houston Pauw and hereby enters a limited appearance representing Jaime Perez-Enriquez solely for the purposes of pursuing this Petition for Reconsideration and Request for Rehearing En Banc. Petitioner is unable to afford counsel. Gibbs Houston Pauw will represent Petitioner on a pro bono basis. AILA and AILF have agreed to assist Gibbs Houston Pauw as “Of Counsel” in this matter because of the exceptional importance of the issue herein.

## PRELIMINARY STATEMENT

This case is one of exceptional importance for thousands of individuals living in the United States as lawful permanent residents with U.S. citizen families. The decision in this case, Perez-Enriquez v. Ashcroft, 383 F.3d 994 (9<sup>th</sup> Cir. 2004), makes a large group of such individuals deportable without any possible relief from deportation, purportedly deferring to the position of the Board of Immigration Appeals. In fact the court defers to a decision of an Immigration Judge that was not reviewed by the Board. The Board issued a streamlined decision under 8 C.F.R. §1003.1(e)(4) affirming the IJ’s decision without opinion. Moreover, the IJ’s order of removal is inconsistent with the Board’s policy and practice throughout the United States. Thus, the Court’s decision creates a split between the Ninth Circuit and the policy that the Board has established. The Court’s

decision is also inconsistent with the law established in the Fifth Circuit. See White v. INS, 75 F.3d 213 (5<sup>th</sup> Cir. 1996).

## BACKGROUND

### **A. The SAW Legalization Program**

In 1986, Congress established a two stage legalization program for Special Agricultural Workers (the "SAW legalization program"), whereby certain farmworkers would be able to obtain permanent resident status in the United States. At the first stage, the applicant was required to prove that he or she had worked for at least 90 days performing "seasonal agricultural work" during the relevant qualifying period. If the application for legalization under the SAW program was approved, then the applicant became a lawful temporary resident ("LTR"), authorized to live and work in the United States at least on a temporary basis. INA §210(a)(4), 8 U.S.C. §1160(a)(4). This completed the first stage of the legalization process. The second stage, which occurred approximately two years later, involved adjustment from LTR status to lawful permanent resident status ("LPR status").

The legalization program provided a mechanism for termination of LTR status, once it had been granted, if the Immigration Service believed that LTR status had been incorrectly granted. See INA §210(a)(3) (1990), as amended by §4 of the Immigration Nursing Relief Act of 1989, Pub. L. 101-238, 103 Stat. 2099

(Dec. 18, 1989). In accordance with this provision, the Immigration Service promulgated regulations providing for the termination of an alien's temporary resident status. See 8 C.F.R. § 210.4(d) (1991). Under these regulations, the Immigration Service could terminate the temporary resident status of an applicant, provided that notice was given to him and certain procedures were followed. Thus, there was a carefully crafted mechanism whereby INS could have terminated SAW LTR status at any time before the applicant was granted LPR status.

If a person's SAW LTR status was not terminated, then the adjustment to LPR status occurred automatically on a fixed date. Under INA §210(a)(2), 8 U.S.C. §1160(a)(2), the date fixed for the vast majority of SAW applicants was December 1, 1990. On that date, the status of an alien who had been granted temporary status was automatically adjusted to that of a LPR, without regard to the alien's admissibility. See Matter of Jimenez-Lopez, 20 I&N Dec. 738, 742 (BIA 1993); Matter of Masri, 22 I&N Dec. 1145, 1154 (BIA 1999) (concurring opinion). See also Aguilera-Medina v. INS, 137 F.3d 1401, 1404 (9<sup>th</sup> Cir. 1998) ("Congress intended the SAW program provisions [to include] the automatic adjustment to permanent resident status .... This adjustment of status is not a discretionary program ...."). As long as temporary resident status had not been terminated, the applicant automatically became a permanent resident on December 1, 1990.

**B. SAW Applicants Are Not "Inadmissible at Time of Entry or**

### **Adjustment of Status”.**

When a person presents himself at the border seeking to enter the United States, he is inspected for admissibility under INA §212(a), 8 U.S.C. §1182(a). If the border officer concludes that the applicant is inadmissible, then the person is not allowed to enter the United States. On the other hand, if the border officer concludes that none of the grounds of inadmissibility apply, then the person is “admitted” and he is allowed to enter the United States.

Similarly, a person applying for adjustment of status under INA §245, 8 U.S.C. §1255 is inspected for admissibility under INA §212(a). The person applying for adjustment under this provision is “assimilated” to the status of a person at the border seeking admission into this country. See Matter of Connelly, 19 I & N Dec. 156 (BIA 1984). If the applicant is inadmissible under §212(a), then the application for adjustment of status is denied. On the other hand, if none of the grounds of inadmissibility in §212(a) apply, then the application for adjustment of status is granted and the person becomes a permanent resident.

In either case - whether an applicant is allowed to enter the United States or whether an applicant is approved for adjustment of status - if it is later discovered that the person was actually inadmissible, the Immigration Service can later commence removal proceedings and deport the person under INA §237(a)(1)(A), 8 U.S.C. §1227(a)(1)(A), for being a person “who at the time of entry or adjustment

of status was within one or more of the classes of aliens inadmissible by the law existing at such time”.

Adjustment of status to permanent residence under the SAW program, INA §210(a)(2), 8 U.S.C. §1160(a)(2), is different from adjustment of status under §245. As the Board explained:

“Admission” has been defined as occurring when an inspecting officer communicates to an applicant for admission his or her determination that the applicant is not inadmissible. This communication normally takes place when the inspector allows the alien to pass through the port of entry. . . . [In addition] it is well established that an applicant for relief under [INA §245] is “assimilated” to the position of an alien seeking entry into this country . . . . Adjustment of status under section 210(a)(2) of the Act involves a different procedure, however. That section adjusts the status of an alien granted lawful temporary status under section 210(a)(1) to that of a lawful permanent resident on the basis of a fixed schedule, without regard to the alien’s admissibility at that time.

Matter of Jimenez-Lopez, 20 I&N Dec. at 742. When a SAW applicant automatically adjusts to LPR status on December 1, 1990, therefore, he cannot be assimilated to the position of an alien seeking admission, as no new inspection took place on that date. The grounds of inadmissibility were not applied to him on December 1, 1990 and he cannot be said to have been inadmissible when he obtained permanent resident status.

INA §237(a)(1)(A), 8 U.S.C. §1227(a)(1)(A), provides that a person is deportable from the United States if he “at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at

such time”. This provision allows the grounds of inadmissibility to be applied after the fact in those cases in which the individual was previously subject to the grounds of inadmissibility. If the inspecting officer at the time of entry or at the time of adjustment of status was deceived or made a mistake, the prior decision can be reconsidered and, in effect, rescinded. However, this can only be done in those cases in which the applicant was previously subject to the grounds of inadmissibility.

Prior to the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (“IMMACT 90”), the statute provided for deportability of any alien who “at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry”. INA §241(a)(1)(A) (1989). IMMACT 90 extended this provision to cover aliens excludable at the time of entry “or adjustment of status”. With this amendment, Congress brought the statute into conformity with case law. See Matter of S, 9 I&N Dec. 548 (AG 1961). In Matter of S, this ground of deportability was applied to individuals who were subject to the grounds of inadmissibility at the time of adjustment of status and who had concealed a relevant ground of inadmissibility. There is no evidence of any intention to apply this ground of deportability if the grounds of exclusion did not apply when the person adjusted status.

**C. This Court’s Decision is Inconsistent with the Board’s Policy with**

**respect to Removable SAW Applicants.**

The Board's policy and practice is that the grounds of inadmissibility do not apply to SAW applicants at the time of adjustment of status to permanent residence. In other words, individuals who have obtained permanent resident status under the SAW program are not "inadmissible at the time of adjustment to permanent resident status". If the applicant was "inadmissible at the time of adjustment to permanent resident status", then he would not have lawfully obtained permanent resident status, and as a result, he would not be eligible for a 212(c) waiver, which is available only to permanent residents. However, under Board policy and practice, a SAW applicant whose status has not been terminated and who automatically adjusted to LPR status on December 1, 1990 is a lawful permanent resident of the United States and is eligible to seek a 212(c) waiver.

In Matter of Rodriguez-Rodriguez, 2004 WL 1739154 (BIA 2004), attached hereto as Exhibit 1, the Respondent, like Mr. Perez-Enriquez, was a SAW applicant who was convicted of a controlled substance offense after being approved for lawful temporary resident status but before automatic adjustment to permanent resident status on December 1, 1990. On March 29, 1990 he pled guilty to sale of cocaine. The Immigration Judge held that Rodriguez-Rodriguez was inadmissible at the time of adjustment of status to permanent residence and therefore did not lawfully obtain permanent resident status. The Board rejected

this argument and held that the grounds of inadmissibility do not apply when a SAW applicant adjusts to permanent residence.

There is no statutory requirement that the respondent establish his admissibility at the time of his adjustment to permanent resident status.

Matter of Rodriguez-Rodriguez, p. 2. Rather:

After the alien has been granted lawful temporary resident status under section 210(a)(1) of the Act, section 210(a)(2) mandates that his status be adjusted to that of lawful permanent resident on a fixed schedule and without further reference to his admissibility.

Id., citing Jimenez-Lopez. See also Matter of Acuna-Martinez, 2004 WL 1167124 (BIA 2004), attached as Exhibit 2.

In Matter of Garcia-Sanchez, 2004 WL 1167066 (BIA 2004), attached as Exhibit 3, the Board considered the issue addressed by this Court: namely, whether an “admission” under the SAW program occurs at the time of adjustment to LTR status or at the time of adjustment to LPR status. The Board held that an “admission” does not occur when the applicant adjusts to LPR status. The Board explained:

Adjustment of status under section 210 of the Act constitutes a lawful admission for temporary residence. . . . As such, the respondent’s adjustment of status to a temporary resident under section 210 of the Act was an admission. However, his subsequent adjustment of status, on December 1, 1990, to a lawful permanent resident pursuant to section 210 of the Act was not an admission.

Matter of Garcia-Sanchez, p. 2, citing Jimenez-Lopez. See also Matter of Herrera-

Mendez, 2004 WL 1167348 (BIA 2004), attached as Exhibit 4 (“We . . . disagree with the DHS that the respondent was inadmissible from the United States when she adjusted her status to a lawful permanent resident”); Matter of Tellez-Gomez, 2004 WL 1159693 (BIA 2004), attached as Exhibit 5 (“There is no statutory requirement that the respondent establish his admissibility at the time of his adjustment to permanent resident status”).

In White v. INS, 75 F.3d 212 (5<sup>th</sup> Cir. 1996), the Fifth Circuit considered whether a person who automatically adjusts status under the SAW program is eligible for the 212(c) waiver. In May 1990, before becoming a permanent resident, White was convicted of conspiring to distribute crack cocaine. As a result, INS initiated deportation proceedings against him in March 1994. The Fifth Circuit recognized that SAW applicants who automatically adjust status on December 1, 1990 become lawful permanent residents who are eligible for a 212(c) waiver. They are not inadmissible at the time of adjustment to LPR status.

Through all of these cases, the Board has established a policy and practice that SAW applicants who automatically adjust status on December 1, 1990 are not “inadmissible at the time of adjustment to permanent resident status.” Rather, such individuals are lawfully adjusted and they are eligible for a 212(c) waiver.

#### LEGAL ARGUMENT

The Court offers three reasons in support of its conclusion that a SAW

applicant should be deemed to be “inadmissible at the time of adjustment to permanent resident status”. However, these reasons reflect a misunderstanding of the governing law and the Board’s policy and practice relating to SAW applicants.

**A. SAW Applicants do not Improperly Obtain Additional Procedural or Substantive Rights.**

The first concern expressed by the Court is that if a SAW applicant such as Mr. Perez-Enriquez is not “inadmissible at the time of adjustment to permanent resident status”, then such individuals may obtain “some additional procedural or substantive rights against any effort by the government to deport him or her.” 383 F.3d at 997. The court observes that SAW applicants who commit a deportable offense before December 1, 1990 could have been deported before that date if they had been promptly discovered; they should not be able to avoid deportability merely because the Immigration Service did not have enough time or resources to locate them before December 1, 1990. 383 F.3d at 997, n. 5.

However, the Court’s concern is misplaced. Any person who was deportable before automatic adjustment occurred on December 1, 1990 - and whose status as a lawful temporary resident could have been terminated before December 1, 1990 - remains deportable after December 1, 1990.<sup>1</sup> The only

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<sup>1</sup> In this case, Perez-Enriquez was initially charged with removal pursuant to INA §237(a)(2)(B)(i) (relating to controlled substance convictions) and §237(a)(2)(A)(iii) (aggravated felony). The prosecuting attorney then withdrew

difference is that such an individual may, through the passage of time, become eligible for relief from deportation that he was not previously eligible for. But that fact is not problematic; a SAW applicant does not thereby unfairly or improperly gain some advantage that he should not have obtained. Indeed, there are many immigration benefits that are obtained through the passage of time that the person would not have been eligible for if the Immigration Service had discovered the relevant facts and taken action earlier. See, e.g. INA §240A(a), 8 U.S.C.

§1229b(a) (eligibility for LPR-cancellation of removal is cut off if DHS commences removal proceedings before the applicant has resided in the United States for seven years); INA §240A(b), 8 U.S.C. §1229b(b) (eligibility for non-LPR cancellation of removal is cut off if DHS commences removal proceedings before the applicant has accrued ten years of continuous physical presence in the United States); INA §240B(b), 8 U.S.C. §1229c(b) (person is not eligible for voluntary departure unless he has been physically present in the United States for at least one year). Thus, a holding that a SAW applicant is not “inadmissible at the time of adjustment to permanent resident status” does not give that person any unfair or improper advantage. He can be placed in removal proceedings; he is

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these charges and charged Perez-Enriquez with being inadmissible at the time of adjustment of status, apparently in an effort to prevent him from being able to apply for the 212(c) waiver.

subject to the same grounds of deportation that he was subject to before the adjustment occurred; and if he does not merit a favorable exercise of discretion then he will be deported from the United States.

**B. This Court's Ruling is Inconsistent With Jimenez-Lopez**

This Court states that finding Mr. Perez-Enriquez to be inadmissible at the time of adjustment to permanent resident status is consistent with the BIA's decision in Jimenez-Lopez. 383 F.3d at 997. In fact, however, the Court's holding is inconsistent with the BIA's decision in Jimenez-Lopez.

In Jimenez-Lopez, the non-citizen had been granted lawful temporary resident status under the SAW legalization program. Then, on April 8, 1990, before adjusting to permanent resident status, he was apprehended at the border attempting to enter with a substantial amount of marijuana in his car. He was not admitted into the United States, but was paroled in for criminal prosecution and on October 1, 1990 he was convicted of importation of marijuana with intent to distribute. Subsequently, on December 1, 1990, he automatically adjusted status under the SAW legalization program and became a permanent resident. When the Immigration Service brought exclusion proceedings against him, Jimenez-Lopez argued that he should be in deportation proceedings; exclusion proceedings were improper, he argued, because he had been admitted to the United States when he adjusted status on December 1, 1990.

The Board of Immigration Appeals rejected Jimenez' argument, explaining that because the grounds of inadmissibility do not apply at the time of automatic adjustment to permanent resident status, the adjustment on December 1, 1990 cannot be deemed to be an "admission". If Mr. Jimenez was "inadmissible at the time of adjustment to permanent resident status", as this Court maintains, then the grounds of inadmissibility would have been applied to him, the adjustment of status would have constituted an admission, and in that case Jimenez-Lopez would not properly be in exclusion proceedings. However, the Board held, there was no admission at the time of adjustment to permanent resident status. The grounds of inadmissibility had never been applied to Jimenez-Lopez and he remained subject to exclusion proceedings after December 1, 1990. Jimenez-Lopez, 20 I&N Dec. at 742-743.

This interpretation, according to which a SAW applicant is not "inadmissible at the time of adjustment to permanent resident status" has been consistently followed by the Board. See, e.g. Matter of Herrera-Mendez, Exhibit 4 ("We . . . disagree with the DHS that the respondent was inadmissible from the United States when she adjusted her status to a lawful permanent resident"); Matter of Tellez-Garcia, Exhibit 5 (the IJ held that the respondent was inadmissible at the time of adjustment to permanent resident status; "We disagree with this analysis"). The Board could not have issued these decisions if, as this Court has held, the SAW

applicants in these cases were “inadmissible at the time of adjustment to permanent resident status”.

**C. This Court’s Deference to a Streamlined BIA Decision Is Not Appropriate.**

Finally, this Court bases its decision on deference to “the BIA’s determination that ‘time of adjustment of status’ refers to the date of Perez-Enriquez’s automatic adjustment to lawful permanent resident [status]”. 383 F.3d at 998. It is important to note, however, that the Board has never determined - not in this case and not in any other case - that the “time of adjustment of status” refers to the date of automatic adjustment to permanent resident status. In this case, it was the Immigration Judge, not the Board of Immigration Appeals, who held that the grounds of inadmissibility apply at the time that Mr. Jimenez-Lopez adjusted to permanent resident status. The Board of Immigration Appeals issued a summary decision under its streamlining regulations without an opinion. The Board has not issued a decision that this Court can give deference to. See, e.g., Lagadaon v. Ashcroft, 383 F.3d 983, 990 (9<sup>th</sup> Cir. 2004) (“We cannot defer to an agency ‘when its path of reasoning is not clear’”).

The Court says that Chevron deference is appropriate because the statutory language “at the time of adjustment of status” is ambiguous and does not reflect a clear Congressional intent. However, in applying the Chevron rule, the Court

should not look only to the language contained in the statute. See, e.g. INS v. Cardoza-Fonseca, 480 U.S. 421, 446(1987) (where court can ascertain congressional intent by employing “traditional tools of statutory construction,” deference is not appropriate); INS v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) (“We only defer ... to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous”).

The statutory framework of the SAW legalization program indicates an intention on Congress’ part that SAW applicants who automatically adjust to permanent residence should be regarded as having lawfully obtained permanent resident status (and therefore not deportable for having been inadmissible when they obtained permanent resident status). As lawful temporary residents, SAW applicants obtained some rights of permanent residence. See INA §210(a)(5), 8 U.S.C. §1160(a)(5). Congress intended that after a temporary period of “partial permanent resident status”, SAW applicants would automatically adjust and become LPR’s with the full rights of permanent residence. That does not mean that a SAW applicant who has adjusted to permanent resident status is not subject to deportation if he or she has a criminal conviction in the past. But it does mean that the person is not inadmissible at the time of adjustment to permanent resident status and the person is therefore eligible for a 212(c) waiver. As the House Judiciary Committee report explained when the legalization program was enacted:

The Committee expects the Attorney General to examine the legalization applications in which there is a waivable ground of exclusion carefully, but sympathetically. The Committee's intent is that legalization should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of *administrative relief* granted by Congress.

H.R. Rep. No. 98-115, 98th Cong., 1st Sess., 69-70.

## CONCLUSION

The Court's decision in this case has extreme and unnecessarily harsh consequences for a large number of people living in the United States as lawful permanent residents. The American Immigration Lawyers Association and the American Immigration Law Foundation recognize the Court's concern that SAW applicants may have adjusted status and become permanent residents even though they could have been deported before adjustment occurred automatically.

However, even if this Court holds that such SAW applicants are not "inadmissible at the time of adjustment of status", they remain deportable on other grounds and can be subjected to removal proceedings. If such charges are brought, then at least these individuals should be recognized, as Congress intended, as permanent residents who have an opportunity to request a humanitarian waiver of the underlying offense. What the Fifth Circuit said in White is relevant:

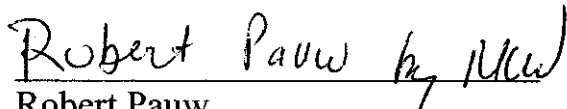
By creating the §212(c) waiver process, Congress authorized the Attorney General to protect aliens with close ties to this country from suffering

extreme hardship as a result of deportation. . . . Adopting the INS's interpretation would restrict the Attorney General's ability to exercise this important discretion by restricting the class of persons eligible for relief. Indeed, "the agency's interpretation . . . frustrates the legislative scheme because it works to prevent those who have developed close ties to the United States from being able to seek a waiver." . . . Therefore, we will not defer to the agency's interpretation, which is contrary to congressional intent, common law principles and common sense.

75 F.3d at 216.

Dated: 10/22/04

Respectfully submitted,



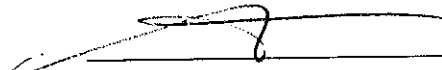
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CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32(e)

I certify that the foregoing brief is double-spaced (excluding footnotes, quotations and headings); is printed using a proportionately spaced 14 point Times New Roman typeface; and includes not more than 4200 words (not including the table of contents, table of authorities, and relevant certificates).

  
Robert Pauw  
Nadine K. Wettstein

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CERTIFICATE OF SERVICE

I, Kerry Foley, hereby certify that I served a copy of the foregoing document on the following persons:

Isaac Campbell  
Office of Immigration Litigation  
Civil Division  
U.S. Department of Justice  
P.O. Box 878, Ben Franklin Station  
Washington, D.C. 20044

by mailing today, via first class mail, postage pre-paid, a copy of the document described above to person named above.

Dated this 22 day of October, 2004.



No. 03-70244

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**JAIME PEREZ-ENRIQUEZ,**

**Petitioner,**

**v.**

**JOHN ASHCROFT, Attorney General,  
Respondent.**

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**FILED**

**DEC 21 2004**

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U.S. COURT OF APPEALS**

**RESPONDENT'S OPPOSITION  
TO PETITIONER'S MOTION FOR RECONSIDERATION AND  
FOR REHEARING EN BANC**

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No. 03-70244

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JAIME PEREZ-ENRIQUEZ,  
Petitioner,

v.

JOHN ASHCROFT, Attorney General,  
Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
BOARD OF IMMIGRATION APPEALS

---

RESPONDENT'S OPPOSITION  
TO PETITIONER'S MOTION FOR RECONSIDERATION AND  
FOR REHEARING EN BANC

---

INTRODUCTION

On September 9, 2004, this Court issued its published decision denying the petition for review. *See Jaime Perez-Enriquez v. Ashcroft*, 388 F.3d 994 (9th Cir. 2004). On October 25, 2004, petitioner filed the instant Petition. On November 23, 2004, this Court directed the government to respond to petitioner's Motion For Reconsideration And Rehearing En Banc ("Petition"). Respondent respectfully

opposes the instant petition and urges this Court not to rehear this case. The panel's unanimous decision in this case addresses a very narrow issue, and presents no misapprehension of law or fact, intra- or inter-circuit conflict, or conflict with U.S. Supreme Court precedent. The panel correctly rejected a series of unpublished (and not citable) and distinguishable decisions of the Board of Immigration Appeals.

### **STATEMENT OF THE ISSUE**

Whether the panel correctly found *de novo* that petitioner's "adjustment of status" within the meaning of 8 U.S.C. § 1227(a)(1)(A) was determined on December 1, 1990, the date of his adjustment to lawful permanent resident under the SAW statute.

### **STATEMENT OF THE CASE**

1. The undisputed facts of this case are set out in the Court's decision and the Petition, and need not be repeated here. Suffice it to say that petitioner concedes that he was convicted of possession of a narcotic controlled substance for sale after he was granted temporary resident status under the Special Agricultural Workers ("SAW") provisions of 8 U.S.C. § 1160(a)(1) on November 10, 1988, but before his temporary status was adjusted to that of a lawful permanent resident on December 1, 1990 under 8 U.S.C. § 1160(a)(2). Based on

his criminal conviction, petitioner was charged by the former Immigration and Naturalization Service ("INS") under 8 U.S.C. § 1227(a)(1)(A)(Supp. IV 1998) with being subject to removal as an alien "who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by law . . . ." Petitioner argued that he was not removable under that provision because the sole, conclusive determination of his admissibility was made on November 10, 1988, prior to his criminal conviction.

2. The immigration judge disagreed, and ordered petitioner removed on August 21, 2001. Administrative Record ("A.R.") 33-35. Citing *Matter of Jimenez-Lopez*, 20 I. & N. Dec. 738 (BIA 1993)(1993 WL 494088), he found that petitioner's adjustment by operation of law to lawful permanent resident status did not constitute a waiver or estoppel of the INS's ability to remove him under 8 U.S.C. § 1227(a)(1)(A). On December 12, 2002, the Board of Immigration Appeals ("BIA") affirmed the decision of the immigration judge without opinion. A.R. 2.

3. A unanimous panel of this Court addressed "the narrow issue of the definition of the term 'adjustment of status' as that term is used in 8 U.S.C. § 1227(a)(1)(A)" *de novo*, and denied the petition for review. It rejected petitioner's argument that his adjustment of status was determined on November 10, 1988, the

"date on which he received lawful temporary residence under the SAW provisions . . . ." and that his admissibility was conclusively and permanently determined as of that date. 383 F.3d at 996. It found "reasonable and entitled to deference" the government's position that under the SAW statute petitioner's adjustment of status was determined on December 1, 1990 , "the date of Perez-Enriquez's adjustment to lawful permanent resident." *Ibid.* (citing *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). It gave three reasons for reaching this conclusion, which reflect the orderly process of adjustment of status under the SAW statute. 1) At the time that a SAW applicant is granted temporary resident status, the "government presumably had no knowledge of the individual alien . . . ." 2) "The time between the adjustment to temporary resident and the automatic adjustment to permanent resident gave the government some time to investigate the applications." 3) Because adjustment to permanent resident status conveys some additional procedural and substantive rights, "it makes sense to use [that date] even though the adjustment is automatic." *Ibid.* The panel then found that the government's construction was consistent with *Jimenez-Lopez*, where the BIA held that the Attorney General's authority to terminate temporary resident status under the SAW statute was permissive and did not mandate an examination of the temporary resident's admissibility prior to adjustment to

permanent status. *Id.* at 997, n.5. Finally, the panel determined that its deference to the Attorney General's interpretation of "adjustment of status" was not undermined by a series of BIA decisions which were issued in another context, unpublished, not acceded to by the Attorney General, and overcome by the BIA's summary affirmance in this case. The panel found that petitioner was removable under 8 U.S.C. § 1227(a)(1)(A) as an alien who was inadmissible at the time of adjustment of status.

### **ARGUMENT**

The Federal Rules of Appellate Procedure provides that panel or en banc rehearing are not favored and limits them to a small subset of cases. Rule 40(a)(2) provides that a petition for panel rehearing must state each point of law or fact that the petitioner believes the panel has overlooked or misapprehended. Rule 35(a) provides that rehearing en banc ordinarily will not be granted unless necessary to secure or maintain uniformity within the circuit or where a question of exceptional importance is involved. Rule 35(b) suggests that another significant factor is whether the panel decision conflicts with "authoritative decisions" of other United States Courts of Appeals which have addressed the issue. Applying these criteria, the instant petitioner does not raise an issue which warrants either panel or en banc rehearing.

**I. The Panel Correctly Found That Petitioner's Adjustment Of Status Within The Meaning Of 8 U.S.C. § 1227(a)(1)(A) Took Place When He Adjusted To Lawful Permanent Resident Under 8 U.S.C. § 1160(a)(2)**

**A. 8 U.S.C. § 1160(a) Requires Completion Of A Two-Step Process Before Adjustment To Permanent Resident Status**

There is no dispute in this case that "adjustment of status" as used in the removal statute at issue here, 8 U.S.C. § 1227(a)(1)(A), encompasses one or the other of the adjustments of status under the SAW statute, 8 U.S.C. § 1160(a). Nor is there any dispute that *if* the term "adjustment of status" refers to petitioner's December 1, 1990, adjustment to lawful permanent resident, then his 1989 criminal conviction places him within a class of aliens who were inadmissible, and subject to removal, within the meaning of 8 U.S.C. § 1227(a)(1)(A). Petitioner contends, however, that November 10, 1988 - the date on which he received lawful temporary status - is the pivotal date, not December 1, 1990; that he was not inadmissible on November 10, 1988; and that his status as such became permanently vested at that point in time. In essence, he contends that he had no obligation to continuously maintain his eligibility to adjust to permanent resident status after receiving

temporary status.<sup>1</sup> That construction, turns the SAW adjustment process on its head, and essentially converts it into a one-step process.

The SAW statute, 8 U.S.C. § 1160(a), is captioned "Lawful Residence." It creates a two-step process for obtaining lawful residence. The first step, in subsection "(1) In General," involves adjusting a qualifying applicant's status to "that of an alien lawfully admitted for temporary residence." In order to qualify, the applicant must have applied within a specified period which ended on November 30, 1988 (8 C.F.R. § 210.5(a)(1998)), resided in the United States and performed seasonal agricultural services within a specified period, and established his admissibility to the United States as an immigrant. If the application is approved, the applicant receives limited rights: he is authorized to travel abroad, including commuting from a residence abroad, and to work in the United States for a temporary period, "in the same manner as for aliens lawfully admitted for permanent residence." 8 U.S.C. § 1160(a)(4). In addition, such an alien is "considered to be an alien lawfully admitted for permanent residence (as described in [8 U.S.C. § 1101(a)(20)], *other than under any provision of the immigration laws*. 8 U.S.C. § 1160(a)(5)(emphasis added). This provision is explained by 8

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<sup>1/</sup> Petitioner agrees that the permanent resident status under the SAW program requires completion of a two-stage process and that the second stage occurs "approximately two years later." Petition at 2.

C.F.R. § 210.4(c), which provides that a SAW temporary resident "is not entitled to submit a [visa petition for spouses and certain children] or to any other benefit or consideration accorded under the Act to aliens lawfully admitted for permanent residence [except for employment and travel authorization]."

But there is a second step. Subsection "(2) Adjustment To Permanent Residence" provides that after a waiting period, which for aliens like petitioner ended on December 1, 1990, SAW applicants were deemed to have adjusted to lawful permanent resident status. An alien such as petitioner who adjusted to lawful permanent residence as of December 1, 1990, may only obtain his Form I-551 Permanent Resident Card, or "green card," after December 1, 1990, and the permanent resident card is dated from the date of adjustment to LPR status (December 1, 1990), not from the date of the initial application for temporary resident status. 8 C.F.R. § 210.5(b). Moreover, the benefits accorded a lawful permanent resident are far broader. Under 8 U.S.C. § 1101(a)(20), such an alien is granted the "privilege of residing permanently in the United States." This Court has recognized that the:

[L]awful permanent resident has met extensive quantitative and qualitative standards at time and entry as an immigrant. He has, legally and properly, established ties to this country. He may work. He normally looks toward citizenship and will have that privilege in time. He enjoys greater rights than the nonimmigrant alien and assumes commensurate responsibilities and

duties.

*Castillo-Felix v. INS*, 601 F.2d 459, 465 n.13 (9th Cir. 1979).

The panel's decision clearly and correctly reflects the logical sequence behind the two-step process. The panel found that "to the extent that a determination of 'adjustment of status' gives an alien some additional procedural or substantive rights against any effort by the government to deport him or her, it makes sense to use the date of adjustment to permanent resident, even though the adjustment is automatic." 383 F.3d at 997. Petitioner's contention that his admissibility was forever established at the grant of temporary status begs the question why Congress established a two-step process. By language and practical effect, the SAW statute establishes that an alien granted temporary resident status has not adjusted to LPR status as a matter of law until the date of his LPR adjustment. Were petitioner correct that the pivotal date in his case was November 30, 1988, the grant to him of employment authorization under 8 C.F.R. § 210.4(3) would be meaningless since he would not need it as an LPR. Moreover, he would have immediately received a green card, and it would be dated from November 30, 1988. But he was not. If petitioner were correct, why would Congress have provided for what he describes as a two-year wait? Petition at 2. Why would Congress not have made him a lawful permanent resident from the very beginning?

As the Supreme Court has stated, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, *reh'g denied*, 384 U.S. 934 (1966). Congress mandated adjustment of status in a two-step process that is complete upon the accomplishment of the second step. That Congress linked adjustment to permanent resident status with the satisfactory completion of a probationary period during which the applicant must maintain his continuing eligibility, see below, fairly reflects the greater rights to be accorded to him relative to those accorded upon the grant of temporary status, and commensurately his greater responsibilities. Petitioner's desire to compress both into a single step runs counter to the intent of Congress.

**B. A SAW Temporary Resident Must Maintain His Continuing Eligibility In Order to Adjust To Permanent Resident Status**

Both by statute and regulation, the period of temporary resident status can be terminated during the period of temporary residence or after the period of temporary residence; consequently, adjustment to permanent resident status is not truly automatic, as petitioner states.<sup>2</sup> Petition at 3. 8 U.S.C. § 1160(a)(3)(B)

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<sup>2/</sup> He cites *Matter of Jimenez-Lopez*, *Matter of Masri*, 22 I. & N. Dec. 1145, 1154 (BIA 1999)(concurring opinion), and *Aguilera-Medina v. INS*, 137 F.3d 1401,

provides that, and the introduction is crucial, "[b]efore any alien becomes eligible for adjustment of status under paragraph (2), the Attorney General may" do either or both of two things: he may "deny adjustment to permanent status" and/or "provide for termination of the temporary resident status granted such alien under paragraph (1)."<sup>3</sup> He may do so for several reasons, including the commission of an act that renders the alien inadmissible. *See* 8 C.F.R. § 210.4(d)(2)(ii). Section 1160(a)(3)(B) was not in the original SAW statute. It was added by Section 4 of The Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238, 103 Stat. 2099, December 18, 1989, as amended by Section 162(f)(1) of The Immigration Act of 1990, Pub. L. No. 101-649, November 29, 1990. Section 4 was entitled "Fraud Prevention in SAW Program." In subsequently enacting this provision, Congress clearly intended that "continuing eligibility" be demonstrated for adjustment to

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1404 (9th Cir. 1998) to support this proposition. None of these authorities had before them the scope of the termination authority of 8 U.S.C. § 1160(a)(3), however, and none considered specifically the authority to deny adjustment to permanent status. The issue in *Matter of Jimenez-Lopez*, discussed *infra*, concerned whether there had been an entry. *Matter of Masri* addressed rescission of adjustment of status and the confidentiality of information. 22 I. & N. Dec. at 1147. *Aguilera-Medina*, addressed whether there had been an entry under the *Fleuti* doctrine. 137 F.3d at 1403. They are distinguishable for these reasons.

<sup>3/</sup> Petitioner mischaracterizes this provision in limiting its application to termination of LTR status. Petition at 2. Indeed, because he committed an act during the period of temporary residence that rendered him inadmissible, the Attorney General is authorized to deny adjustment to permanent status. 8 C.F.R. § 210.4(d)(2)(ii).

permanent resident status. Eligibility for adjustment of status, includes, among other factors, admissibility to the United States. *Matter of Garcia*, 16 I. & N. Dec. 653 (BIA 1978). The implementing regulations place the burden on the alien. 8 C.F.R. § 210.5(a) provides that the status of an alien lawfully admitted for temporary residence shall be adjusted to that of an alien lawfully admitted for permanent residence "if the alien has otherwise maintained such status as required by the Act." What the alien must "maintain" is his admissibility as an immigrant. 8 U.S.C. § 1160(a)(1)(C). The continuing nature of the obligation is reinforced by the regulatory requirement that "[t]ermination proceedings must be commenced before the alien *becomes eligible* for adjustment to" permanent resident status. 8 C.F.R. § 210.4(d)(2)(ii)(emphasis added).

**C. There Is No Misapprehension Of Fact Or Law,  
Or Inter- Or Intra-Circuit Conflict**

The concepts of "entry" and "admission" are not at issue in this case; they were not addressed by the panel. The panel clearly stated that "[t]his case concerns the narrow issue of the definition of the term 'adjustment of status' as used in 8 U.S.C. § 1227(a)(1)(A) and its application to petitioner." 383 F.3d at 995. It later repeated its narrow focus, and added that "*accordingly, [we] do not address other terms such as 'entry' or 'date of admission.'* As the BIA noted in

*Jimenez-Lopez*, 'entry' may have a very different definition than 'adjustment of status.'" *Id.* at 997 n.4 (emphasis added).<sup>4</sup>

Petitioner attaches five unpublished decision of the BIA to support the proposition that "the grounds of inadmissibility do not apply to SAW applicants at the time of adjustment of status to permanent residence." Petition at 7. Apart from the fact that they are unpublished and are not precedential, these decisions did not address presented here, that is, when "adjustment of status" under the SAW statute takes place. Rather, each considers either whether the applicant for adjustment was eligible to adjust or when the alien was admitted to this country. The panel correctly noted that these decisions arose "in another context" and "do not undermine our deference to the Attorney General's interpretation of 8 U.S.C. §

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<sup>4/</sup> The issue in *Matter of Jimenez-Lopez* was whether the alien should have been placed in deportation proceedings, rather than exclusion proceedings, because he made an "entry." The BIA found that an "entry" had not been made when the alien crossed the border because, while he was inspected, he was not admitted *at that time*. Accordingly, the BIA turned to the question whether the alien had later been admitted, and thus completed an "entry," by virtue of his adjustment to lawful permanent resident status under the SAW statute. It concluded that an adjustment of status under 8 U.S.C. § 1255 was an admission, but an adjustment under the SAW statute is different; it is not an admission (and does not complete the process for an entry) because the SAW statute adjusts status from lawful temporary status to lawful permanent status "on the basis of a fixed schedule, without regard for the alien's admissibility at that time." 20 I. & N. Dec. at 742. As the panel here stated, none of these considerations are relevant to its determination. The panel decision was therefore not, as petitioner contends, Petition at 12-14, inconsistent with *Matter of Jimenez-Lopez*.

1227(a)(1)(A) in this case." The panel also noted that the BIA's affirmed the immigration judge's finding of the date of adjustment, and "there has been no showing of the Attorney General taking a public position contrary to the position put forth in this case." 383 F.3d at 998.

*White v. INS*, 75 F.3d 213 (5th Cir. 1996) is likewise distinguishable. It did not address whether the phrase "adjustment of status" in 8 U.S.C. § 1255 refers to adjustment to lawful permanent residence or to lawful permanent residence under section 1160. The court there addressed the entirely different question whether "unrelinquished domicile" for purposes of computing eligibility for a waiver of deportation under 8 U.S.C. § 1182(c) should be determined by reference only to years of "permanent residence." The court determined that the period of domicile commenced with White's adjustment to temporary resident status under SAW. It reached that conclusion by defining the term "domicile." Notably, the court found that for "domicile to be lawful, an alien need not obtain lawful permanent residency but must 'have the ability under the immigration laws, to form the intent to remain in the United States indefinitely.' A person may form the requisite intent when she becomes a 'lawful temporary resident' under [SAW] because the statute provides for her eventual adjustment to permanent resident status." *Id.* at 215 (footnote omitted). Clearly, the Fifth Circuit addressed an entirely different issue than the one

correctly resolved by the panel here.

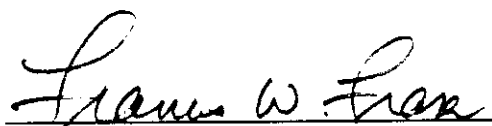
**CONCLUSION**

For the foregoing reasons, the panel's determination that the "government's position is reasonable and entitled to deference" should not be disturbed. The Court should deny the Petition.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Francis W. Fraser".

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CATHY A. GATTERSON, CLERK  
U.S. COURT OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Jaime Perez-Enriquez,  
Petitioner/Appellee  
v.  
John Ashcroft, Attorney General  
Respondent/Appellant

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PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

---

PETITION FOR PANEL REHEARING (FRAP 40)  
AND FOR REHEARING EN BANC (FRAP 35)

---

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### II. STATUTES AND REGULATIONS

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## INTRODUCTION

Petitioner, Jaime Perez-Enriquez, hereby moves this court to reconsider the decision issued on June 14, 2004. In the alternative, Mr. Perez-Enriquez petitions the court for rehearing en banc. The panel decision in this case overlooks an issue of law raised by Petitioner, namely whether Petitioner is eligible for a waiver under INA §212(c), 8 U.S.C. §1182(c) (1995). See INS v. St. Cyr, 533 U.S. 289 (2001). Rehearing en banc is warranted because the issues presented in this case are of exceptional national significance. Petitioner believes that this case affects thousands of individuals living in the United States as lawful permanent residents. See Amicus Brief filed concurrently by American Immigration Lawyers Association and American Immigration Law Foundation.

The Board of Immigration Appeals has, independently of this case, adopted a reasonable and fair interpretation of the statute that is at odds with the Immigration Judge's decision in this case and this panel's decision. According to the Board's interpretation, individuals like Petitioner who obtained permanent resident status under the Special Agricultural Worker ("SAW") legalization program are eligible for 212(c) relief. In this case, the Immigration Judge issued a decision inconsistent with the Board's policy, and then the Board of Immigration Appeals issued a streamlined decision. The panel decision adopts the decision of the Immigration Judge, and thereby overturns the Board's reasonable and more generous policy. As a result SAW applicants like the Petitioner are left being

deportable and ineligible for any waiver of deportation. The result will be that thousands of individuals, including Mr. Perez-Enriquez, will be torn apart from their U.S. citizen families with absolutely no possibility to obtain a waiver or other equitable relief. Such a result is fundamentally inhumane and inconsistent with the Board's reasonable interpretation of the statute.

## LEGAL ARGUMENT

### A. This Court Has Overlooked the Issue of Petitioner's Eligibility for 212(c) Relief.

The Supreme Court has established that lawful permanent residents who pled guilty to a deportable offense prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") remain eligible for a waiver of deportation under INA §212(c), 8 U.S.C. §1182 (1995) in spite of the fact that §212(c) was repealed by IIRIRA. INS v. St. Cyr, 533 U.S. 289 (2001). In response to the Petitioner's request for a 212(c) waiver, the Immigration Judge applied Monet v. INS, 791 F.2d 752 (9th Cir. 1986), and held that Mr. Perez-Enriquez is not eligible for 212(c) relief.<sup>1</sup> In his appeal to the Board of Immigration Appeals and in his Petition for Review, Mr. Perez-Enriquez argued that the Immigration Judge wrongly applied Monet to his case. Petitioner argued:

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<sup>1</sup> The Immigration Judge refers to "relief as a long term permanent resident under Monet." In doing so, the Immigration Judge was referring to 212(c) relief. See INA §212(c), 8 U.S.C. §1182(c) (1995) (relief for permanent residents who have had a domicile in the United States for at least seven years). See also Monet, 791 F.2d at 753 (referring to relief under §212(c)).

“the Petitioner did, in fact, lawfully meet the requirements set forth in INA §210, 8 U.S.C. §1160, and therefore, did lawfully attain his status as a permanent resident...Because the Petitioner was lawfully admitted and was lawfully adjusted to permanent resident, *Monet* is inapplicable.” Petitioner’s Opening Brief, p. 15.

In *Monet*, the petitioner was convicted of possession of marijuana for sale before he applied for adjustment of status under INA §245(a), 8 U.S.C. §1255(a), and obtained permanent resident status. He was able to obtain permanent resident status because he concealed this conviction and committed fraud when he obtained permanent resident status. 791 F.2d at 753. See Form I-485, available at [www.uscis.gov](http://www.uscis.gov) (asking whether the applicant has ever been convicted of a drug related offense). Monet committed fraud by not disclosing the fact of his prior conviction when he applied for adjustment of status. The Ninth Circuit noted: “It is clear, however, that his conviction would have precluded him under [INA §212(a)(2)(A)(i)(II), 8 U.S.C. §1182, the ground of inadmissibility for persons convicted of drug offenses] from obtaining permanent resident status.” *Id.* In other words, “he had not been lawfully accorded the privilege of residing permanently in the United States.”

In contrast, Mr. Perez-Enriquez did lawfully obtain permanent resident status. He did not commit fraud. Mr. Perez-Enriquez did not have to conceal any information or fraudulently complete Form I-485 or any other application form in order to obtain permanent resident status. His adjustment of status occurred

automatically and without regard to the grounds of inadmissibility on December 1, 1990. As the Board of Immigration Appeals explained:

[U]nlike section 245 of the Act, which requires both a discretionary determination and consideration of statutory requirements such as the alien's continuing admissibility, provisions set forth at section 210 do not mandate an examination of a lawful temporary resident's admissibility, but rather provide for an "automatic" adjustment after 2 years of status as a temporary resident. See *Matter of Jimenez-Lopez*.

In re Acuna-Martinez, 2004 WL 1167124 (BIA 2004) (unpublished decision), attached hereto as Exhibit 2, p.1. Therefore, Mr. Perez-Enriquez is eligible for the 212(c) waiver. See In re Tellez-Gomez, 2004 WL 1159693 (BIA 2004) (unpublished decision), attached hereto as Exhibit 4, p. 3 ("we will remand the record to permit the respondent an opportunity to apply for relief under section 212(c) of the Act"); In re Rodriguez-Rodriguez, 2004 WL 1739154 (BIA 2004) (unpublished decision) (same), attached hereto as Exhibit 1; In re Herrera-Mendez, 2004 WL 1167348 (BIA 2004) (unpublished decision) (affirming the IJ's decision that the respondent is eligible for 212(c) relief), attached hereto as Exhibit 3.

Acuna-Martinez is especially relevant because it reveals the inconsistency of the panel's decision. In Acuna-Martinez, the respondent applied for a waiver under INA §212(h), 8 U.S.C. §1182(h). In order to be eligible for a 212(h) waiver, however, one must be a non-permanent resident. A permanent resident is not eligible for the 212(h) waiver. Matter of Ayala-Arevalo, 22 I&N Dec. 398 (BIA 1998). Acuna-Martinez argued that he had not lawfully obtained permanent resident status precisely because he had been convicted of an aggravated felony and was therefore inadmissible when he automatically adjusted status. The Board

rejected that argument. Even if he was inadmissible at the time of adjustment of status, because the adjustment of status occurred automatically he had lawfully obtained permanent resident status and consequently he was not eligible for the 212(h) waiver.

It is not fair or consistent for this panel to adopt a position according to which when a SAW applicant applies for 212(c) relief, he is disqualified because he is deemed not to be a lawful permanent resident, but then when he applies for a 212(h) waiver claiming not to be a permanent resident, the Board can turn around and say, based on its prior precedent decisions, that he is deemed to be a lawful permanent resident. Such a position is incoherent and fundamentally unfair.

The petitioner in White v. INS, 75 F.3d 212 (5th Cir. 1996), was similarly situated to Mr. Perez-Enriquez. In May 1990, before becoming a lawful permanent resident, White was convicted of conspiracy to distribute cocaine. On December 1, 1990, he automatically adjusted status and became a lawful permanent resident, even though he was inadmissible at the time of the automatic adjustment of status. Nevertheless, the Fifth Circuit held that White was eligible for a 212(c) waiver and remanded the case to the Immigration Judge for consideration of 212(c) relief. 75 F.3d at 216.

To the extent that this panel has overlooked Petitioner's eligibility for 212(c) relief, its decision is inconsistent with (1) the established policy of the Board of Immigration Appeals; and (2) the Fifth Circuit's decision in White. Petitioner

respectfully requests this court to reconsider its decision in this respect or, in the alternative, requests that the full court reconsider the decision en banc.

B. The Panel's Decision on "Inadmissible at Time of Adjustment of Status" Is Inconsistent with Board Policy.

This panel adopts a policy that is inconsistent with published and unpublished Board decisions. Moreover, the position adopted is much harsher than the reasonable and generous Board position on this particular issue. Petitioner submits that it is improper for this court to adopt, in a published decision, a position that is inconsistent with a reasonable interpretation of the statute adopted by the agency. Instead, this court should give deference to the Board's reasonable interpretation of the statute. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). If this court is concerned that the Board has adopted an overly generous interpretation of the statute, then at a minimum, the court should vacate its decision and remand to the Board for further consideration. It is not proper for this court to precipitantly promulgate a contrary policy that will harm thousands of individuals living lawfully in the United States.

The panel's decision is directly contrary to Board policy as announced in several decisions. For example, in In re Herrera-Mendez, Exhibit 3, the respondent obtained lawful temporary resident status and then subsequently, on August 17, 1990, was convicted of a drug offense. On December 1, 1990 she automatically

adjusted status and became a lawful permanent resident. The Department of Homeland Security argued for the same position that the panel in this case adopted: the respondent was removable because she was inadmissible at the time of adjustment of status. The Board stated: “We . . . disagree with the DHS that the respondent was inadmissible from the United States when she adjusted her status to a lawful permanent resident.” In re Herrera-Mendez, Exhibit 3, p. 2. The Board offered the following explanation:

[P]ursuant to section 210(a)(1)(C) of the Act, an alien’s admissibility to the United States is determined as of the time of his adjustment to that of lawful temporary resident. See also section 210(c)(2) of the Act (relating to waivers of specified grounds of inadmissibility in determining an alien’s admissibility under section 210(a)(1)(C) of the Act). After the alien has been granted lawful temporary resident status under section 210(a)(1) of the Act, section 210(a)(2) mandates that his status be adjusted to that of lawful permanent resident based on a fixed schedule and without further reference to his admissibility. See Matter of Juarez, 20 I&N Dec. 340, 345 (BIA 1991); see also Matter of Jimenez-Lopez, 20 I&N Dec. 738, 742 (BIA 1993); Matter of Masri, 22 I&N Dec. 1145, 1154 (BIA 1999) (concurring opinion).

Id.<sup>2</sup>

The panel argues that its position - that a SAW legalization applicant is inadmissible at the time of adjustment of status to permanent resident status - is consistent with the published Board decision in Matter of Jimenez-Lopez, 20 I&N Dec. 738 (BIA 1993). Slip Op. at 7054. According to the panel, its position is consistent with Jimenez-Lopez because in Jimenez-Lopez the Board held that

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<sup>2</sup> It should be noted that this language is boilerplate, appearing in other Board decisions. See, e.g. In re Rodriguez-Rodriguez, Exhibit 1; In re Tellez-Gomez, Exhibit 4.

exclusion proceeding against the petitioner were proper even though he had automatically adjusted to permanent resident status on December 1, 1990. Id.

However, here the panel has misinterpreted Jimenez-Lopez. Jimenez-Lopez had departed from the United States and he was apprehended at the border when he returned. The reason that the grounds of inadmissibility applied to Jimenez-Lopez was not because of the automatic adjustment of status, but rather because he was stopped at the border while attempting to reenter. See INA §212(a), 8 U.S.C. §1182(a) (listing the classes of individuals who “shall be excluded from admission into the United States”). If Jimenez-Lopez had never left the United States, then the grounds of inadmissibility would not have applied to him.

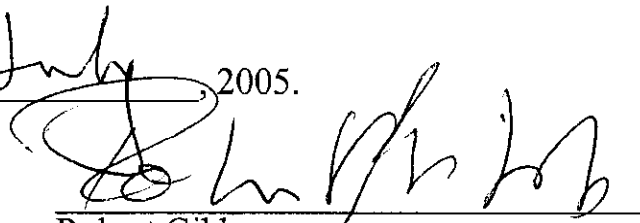
Moreover, the Board constantly cites to Jimenez-Lopez for the proposition that a SAW applicant who automatically obtained permanent residence on December 1, 1990 is not “inadmissible from the United States when she adjusted her status to a lawful permanent resident.” Herrera-Mendez, Exhibit 3, p. 2. See also Tellez-Gomez, Exhibit 4, p. 2; Rodriguez-Rodriguez, Exhibit 1, p. 2. To the argument that the position adopted by this panel is consistent with Jimenez-Lopez, the Board states flatly: “We disagree with this analysis.”

## CONCLUSION

For the foregoing reasons, Petitioner requests this court to reconsider its decision, vacate its order, and remand to the Immigration Court for consideration of a 212(c) waiver. Alternatively, Petitioner requests rehearing en banc by the full

court. The policy adopted by this court overturns a reasonable and generous interpretation of the statute adopted by the Board, one that ought to be given deference. The panel's decision will harm thousands of SAW applicants living legally in the United States with U.S. citizen family members. The panel's decision should be overturned.

Dated this 26<sup>th</sup> day of July, 2005.

  
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No. 03-70244

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Jaime Perez-Enriquez,  
Petitioner/Appellee

v.

John Ashcroft, Attorney General  
Respondent/Appellant

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PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION  
APPEALS

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AMICUS CURIAE BRIEF IN SUPPORT OF  
MOTION FOR RECONSIDERATION AND REHEARING EN BANC

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## PRELIMINARY STATEMENT

This case presents an issue of exceptional importance respecting the interpretation and application of the immigration legalization program of 1986, the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359. The issues raised in this case effect numerous individuals living in the United States as lawful permanent residents. See Nancy Rytina, IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001, U.S. Immigration and Naturalization Service, Office of Statistics (Oct. 2002) (available at: <http://uscis.gov/graphics/shared/statistics/index.htm>). The panel decision reported at Perez-Enriquez v. Gonzales, 411 F.3d 1079, Slip Op. 03-70244, 7047 (9th Cir. Jun. 14, 2005), adopts the decision of an Immigration Judge that was streamlined by the Board of Immigration Appeals (Board). Slip op. at 7049. The panel held that the term "adjustment of status" used in 8 U.S.C. § 1227(a)(1)(A) refers "to the date of . . .

adjustment to lawful permanent resident." Slip. Op. at 7054.<sup>1</sup> This holding is incorrect as a matter of statutory interpretation and, importantly, as a matter of deference. Respecting the issues at hand, the Board of Immigration Appeals has already definitively interpreted the statute and its interpretation must be accorded deference. Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837, 843 (1984).

The motion for reconsideration or rehearing en banc should be granted for three reasons. First, the panel opinion has fundamentally altered long-standing settled law which, by its own terms, was unintended. Second, as the several decisions noted below evidence, the issues raised herein recurs with great regularity before the Board and effect numerous individuals. The questions raised in Mr. Perez-Enriquez's case are, thus, of great general importance and a clear, uniform answer will aid in the administration of the

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<sup>1</sup> The panel also dealt with a jurisdictional issue which, no matter how resolved, has been mooted with the passage of the Real ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005). Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005).

immigration laws. Third, the panel opinion represents a real and significant error which must be corrected. Consequently, the court should hear this case en banc. Hart v. Massanari, 266 F.3d 1155, 1172 n29 (9th Cir. 2001) (addressing en banc procedures).

#### STATEMENT OF INTEREST OF AMICUS

American Immigration Lawyers Association ("AILA") is a national association with approximately 9,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland

Security and before the Executive Office for Immigration Review (immigration courts), as well as before United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

### ARGUMENT

The Board's decision in Matter of Jimenez-Lopez, 20 I&N Dec. 738 (BIA 1993), is dispositive of the issues at hand and this Court must accord deference to the BIA's previous determination. The panel opinion in Perez-Enriquez has inadvertently overruled Board precedent, Matter of Jimenez-Lopez which directly addresses the issues here. Slip Op. at 7054 ("The use of the date of adjustment to permanent resident is consistent with the BIA's decision in Jimenez-Lopez"). The Board's decision, which is dispositive of Mr. Perez-Enriquez's case, is due deference and should not have been disturbed by the panel.

#### 1. Relevant Statutory Provisions.

##### A. 8 U.S.C. § 1227(a)(1)(A).

For all aliens who have been admitted to the United States, Congress empowered the Attorney General to deport any alien who was not admissible at the time of admission. This statutory power, codified at 8 U.S.C. § 1227(a)(1)(A) reads,

Inadmissible aliens. Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by law existing at such time is deportable.

This statute permits the Attorney General to deport an alien who, by inadvertence, mistake, or concealment, was able to gain admission to the United States despite being inadmissible. Because an alien can obtain status in the United States through adjustment or through a physical entry, the statute encompasses both. Matter of Rainford, 20 I&N Dec. 598, 601 (1992) ("An adjustment of status. . .does not constitute an entry."); cf. Matter of Rosas-Ramirez, 22 I&N Dec. 616, 618 (BIA 1999) (discussing same in context of INA § 245A adjustments). The statutory reference to "adjustment of status" at 8 U.S.C. § 1227(a)(1)(A) is not solely

tied to the according of lawful permanent residence, rather, it refers more broadly to the moment in time when an alien must demonstrate admissibility in the category in which admission is sought. Matter of Rainford, 20 I&N Dec. at 601 ("As we have repeatedly held, an adjustment of status is merely a procedural mechanism by which an alien is assimilated to the position of one seeking to enter the United States.").

B. 8 U.S.C. § 1160(a)(1) & (2).

In 1988, Congress created a program, called the Special Agricultural Worker program, to permit certain agricultural workers a means to obtain permanent residence. See Immigration Reform and Control Act of 1986 § 302(a), Pub. L. No. 99-603, 100 Stat. 3359; Stephen Yale-Loehr, Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986, 15 N.Y.U. Rev. L. & Soc. Change 333, 346 (1986) (explaining SAW program). The Attorney General was required to accord "lawful temporary residence" to an alien who, among other requirements, demonstrated that

he was "admissible to the United States as an immigrant". 8 U.S.C. § 1160(a)(1)(C); see also Matter of Juarez, 20 I&N Dec. 340, 342 (BIA 1991) (explaining lawful temporary residence).

After a definitive period of time, Congress automatically converted aliens admitted as lawful temporary residents to lawful permanent residents. 8 U.S.C. § 1160(a)(2) ("The Attorney General shall adjust the status of any alien provided lawful temporary resident status under paragraph (1) to that of an alien lawfully admitted for permanent residence on [a fixed date]"). Notably absent from the statutory language in § 1160(a)(2) is any admissibility requirement. This is striking given Congress' explicit requirement of admissibility in § 1160(a)(1) and other provisions. Cf. 8 U.S.C. § 1255(a) (requiring alien to be admissible at time of adjustment). This absence is dispositive. "Adjustment of status under [§ 1160(a)(2)]. . .adjusts the status of an alien granted lawful temporary status under [§ 1160(a)(1)] to that of

a lawful permanent resident on the basis of a fixed schedule, without regard for the alien's admissibility at that time." Matter of Jimenez, 20 I&N Dec. at 742.

2. The Board's Decision in Matter of Jimenez-Lopez.

The Board has previously ruled on the issues raised in this present matter. In Matter of Jimenez-Lopez, the Board held that the admissibility an alien granted lawful permanent residence under § 1160(a) is determined at the time lawful temporary residence is accorded. 20 I&N Dec. at 742. The Board has uniformly applied this holding in cases coming before it. See e.g., In re Rodriguez-Rodriguez, 2004 WL 1739154 (BIA 2004) (Attached as Exhibit 1); In re Acuna-Martinez, 2004 WL 1167124 (BIA 2004) (Attached as Exhibit 2); In re Garcia-Sanchez, 2004 WL 1167066 (BIA 2004) (Attached as Exhibit 3); In re Herrera-Mendez, 2004 WL 1167348 (BIA 2004) (Attached as Exhibit 4); In re Tellez-Gomez, 2004 WL 1059693 (BIA 2004) (Attached as Exhibit 5).

As the Board explained, the automatic conversion from temporary to permanent residence under § 1160(a)(2), being "unique under the immigration laws", is not trigger for determining admissibility. Matter of Jimenez-Lopez, 20 I&N Dec. at 742. A lawful temporary resident "may apparently adjust his or her status to that of a lawful permanent resident even if physically outside of the United States". Id.

Importantly, § 1227(a)(1)(A) is concerned with admissibility. If Congress deems an alien inadmissible at the time admission, then the alien is properly within the scope of § 1227(a)(1)(A). We recognize that the statute substitutes the phrase "at entry or adjustment of status" in lieu of "admission." This difference is unremarkable because the terms are, for all purposes relevant here, interchangeable. See e.g., Matter of Rosas-Ramirez, 22 I&N Dec. at 619

("[A]dmission to permanent resident status occurred through two routes: (1) inspection and authorization at

the border and (2) adjustment of status while in the United States.").

There is no doubt that Congress entrusted the Board the administration of the relevant statutory provisions. INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("It is clear that principles of Chevron deference are applicable to this statutory scheme. The INA provides that '[t]he Attorney General shall be charged with the administration and enforcement' of the statute and that the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'"). The Board has particular expertise in the administration and interpretation of the immigration laws. The Board's interpretation is reasonable. Given Congress's placement of the admissibility requirement in § 1160(a)(1) and its omission in § 1160(a)(2), the Board was reasonable in concluding that admissibility is only at issue at the time lawful temporary status is conveyed. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("[W]here

Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation omitted).

With the exception of this case, the Board has not deviated from its position. In In re Rodriguez-Rodriguez, 2004 WL 1739154 (BIA 2004) (Attached as Exhibit 1), the Respondent, like Mr. Perez-Enriquez, was a SAW applicant who was convicted of a controlled substance offense after being approved for lawful temporary resident status but before automatic adjustment to permanent resident status on December 1, 1990. On March 29, 1990 he pled guilty to sale of cocaine. The Immigration Judge held that Rodriguez-Rodriguez was inadmissible at the time of adjustment of status to permanent residence and therefore did not lawfully obtain permanent resident status. The Board rejected this argument and held that the grounds of

inadmissibility do not apply when a SAW applicant adjusts to permanent residence.

There is no statutory requirement that the respondent establish his admissibility at the time of his adjustment to permanent resident status. In re Rodriguez-Rodriguez, p. 2. Rather,

[a]fter the alien has been granted lawful temporary resident status under section 210(a)(1) of the Act, section 210(a)(2) mandates that his status be adjusted to that of lawful permanent resident on a fixed schedule and without further reference to his admissibility.

Id., citing Jimenez-Lopez. See also In re Acuna-Martinez, 2004 WL 1167124 (BIA 2004) (Attached as Exhibit 2) (holding that a SAW applicant who automatically adjusted status on December 1, 1990 lawfully became a permanent resident, even if at the time the person fell under a ground of inadmissibility for having been convicted of a crime).

In In re Garcia-Sanchez, 2004 WL 1167066 (BIA 2004) (Attached as Exhibit 3), the Board considered the issue addressed by this Court: namely, whether an

"admission" under the SAW program occurs at the time of adjustment to LTR status or at the time of adjustment to LPR status. The Board held that an "admission" does not occur when the applicant adjusts to LPR status.

The Board explained:

Adjustment of status under section 210 of the Act constitutes a lawful admission for temporary residence. . . . As such, the respondent's adjustment of status to a temporary resident under section 210 of the Act was an admission. However, his subsequent adjustment of status, on December 1, 1990, to a lawful permanent resident pursuant to section 210 of the Act was not an admission.

Matter of Garcia-Sanchez, (Exhibit 3, p. 2), citing Jimenez-Lopez. See also Matter of Herrera-Mendez, 2004 WL 1167348 (BIA 2004) (Attached as Exhibit 4) ("We . . . disagree with the DHS that the respondent was inadmissible from the United States when she adjusted her status to a lawful permanent resident"); Matter of Tellez-Gomez, 2004 WL 1059693 (BIA 2004) (Attached as Exhibit 5) ("There is no statutory requirement that the

respondent establish his admissibility at the time of his adjustment to permanent resident status").

It is worth noting that in Matter of Tellez-Gomez, the Board considered the position adopted by the panel in this case. After considering the point, the Board rejected the position. In re Tellez-Gomez, 2004 WL 1059693 (holding that "[w]hereas adjustment pursuant to section 245 of the Act requires that an alien be admissible to the United States at the time of his adjustment to lawful permanent residence, adjustment pursuant to section 210(a)(2) of the Act has no such requirement. Instead, pursuant to section 210(a)(1)(C) of the Act, an alien's admissibility to the United States is determined as of the time of his adjustment to that of lawful temporary resident.")

The Board's interpretation of the statute is entitled to great deference. As evidenced by the decisions discussed above, the Board has consistently adhered to their interpretation of the statute they administer. U.S. v. Clark, 454 U.S. 555, 564 (1982)

("[T]he construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time.")

3. The Panel Decision Misapplies, And As A Result, Overturns The Board's Decision In Matter of Jimenez-Lopez.

The panel framed the inquiry here as one which "concern[ed] the narrow issue of the definition of the term 'adjustment of status' as used in 8 U.S.C. § 1227(a)(1)(A) and its application to petitioner." Perez-Enriquez, slip op. at 7051. The panel then held that the definition of "adjustment of status" refers "to the date of Perez-Enriquez's adjustment to lawful permanent resident." Id. The panel gave three reasons why this is so. First, the panel explained that to hold otherwise would grant aliens such as Mr. Perez-Enriquez additional procedural or substantive rights in resisting deportation. Id. at 7054. Second, the panel stated that its ruling was consistent with Matter of Jimenez-Lopez. Id. Finally, the panel reasoned that

the benefits afforded a lawful permanent resident are greater than those of a lawful temporary resident. Id. at 7055.

As an initial matter, it bears remark that this case does not require resort to the vague statutory rationales proffered by the panel because the statute is clear. The question of admissibility, i.e. "adjustment of status", for applicants under § 1160(a) was determined at the time lawful temporary status was adjudicated. The phrase "adjustment of status" in § 1227(a)(1)(A) is a statutory analogue for determining the admissibility of an alien when Congress has so required an alien to be admissible. Matter of Rainford, 20 I&N Dec. at 601. Congress did not require an alien to be admissible at the time lawful temporary status was converted to lawful permanent status. Cf. 8 U.S.C. § 1160(a)(1) (requiring admissibility) with 8 U.S.C. § 1160(a)(2) (omitting admissibility requirement); accord Matter of Jimenez-Lopez, 20 I&N Dec. at 740. Consequently, if Congress has not required an alien to

be admissible at the time of adjustment, then it is beyond the power of the Court of Appeals to so require.

Moreover, none of the reasons given by the panel in support of its decision are well-taken. First, section § 1160 SAW applicants do not obtain additional procedural or substantive rights. Any person who was deportable before automatic adjustment occurred on December 1, 1990 - and whose status as a lawful temporary resident could have been terminated before December 1, 1990 - remains deportable after December 1, 1990.<sup>1</sup>

It is unremarkable that such an individual may, through the passage of time, become eligible for relief from deportation that he was not previously eligible for. Indeed, there are many immigration benefits that

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<sup>1</sup> In this case, Perez-Enriquez was initially charged with removal pursuant to INA §237(a)(2)(B)(i) (relating to controlled substance convictions) and §237(a)(2)(A)(iii) (aggravated felony). The prosecuting attorney then withdrew these charges and charged Perez-Enriquez with being inadmissible at the time of adjustment of status, apparently in an effort to prevent him from being able to apply for the 212(c) waiver. Even if Mr. Perez-Enriquez is not deportable for being inadmissible at the time of adjustment of status, he remains subject to deportation under the original charges.

are obtained through the passage of time that the person would not have been eligible for if the Immigration Service had discovered the relevant facts and taken action earlier. See, e.g. INA §240A(a), 8 U.S.C. §1229b(a) (eligibility for LPR-cancellation of removal is cut off if DHS commences removal proceedings before the applicant has resided in the United States for seven years); INA §240A(b), 8 U.S.C. §1229b(b) (eligibility for non-LPR cancellation of removal is cut off if DHS commences removal proceedings before the applicant has accrued ten years of continuous physical presence in the United States); INA §240B(b), 8 U.S.C. §1229c(b) (person is not eligible for voluntary departure unless he has been physically present in the United States for at least one year). Consequently, the panel's concern is misplaced. A holding that a SAW applicant is not "inadmissible at the time of adjustment to permanent resident status" does not give that person any unfair or improper advantage. The Attorney General retains the expulsion power and can

institute removal proceedings subjecting the alien to the same grounds of deportation regardless of the adjustment.

Second, the panel has, apparently inadvertently, overturned the Board's decision in Matter of Jimenez-Lopez. The holding in Perez-Enriquez cannot be reconciled with Matter of Jimenez-Lopez. Under the panel opinion, a SAW applicant's admissibility is determined on the date temporary status is converted to permanent status. Under Matter of Jimenez-Lopez, admissibility is determined only when Congress required it: at the time temporary status is adjudicated.

Finally, the fact that lawful permanent residents enjoy more rights than lawful temporary residents is beside the point. That Congress granted additional rights to one class of aliens, as opposed to another, says nothing about admissibility. Even so, the panel's assertion that rights enjoyed by lawful permanent residents is "far broader" than those of lawful temporary residents is not well-supported by the

statute or practice. Yale-Loehr, 15 N.Y.U. Rev. L. & Soc. Change at 361 ("In most respects the new law treats SAWs in temporary resident status the same as permanent resident aliens."). Accordingly, the panel's reliance on these distinctions does not actually support their point.

#### CONCLUSION

The panel opinion in Perez-Enriquez has overturned, inadvertently, a dispositive Board precedent. Because the Board's precedent decision is correct and because the panel should have deferred to the published, reasonable interpretation of the agency, the petition for reconsideration and rehearing en banc should be granted.

Dated this 27<sup>th</sup> day of July, 2005.

Respectfully submitted,

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ASSOCIATION  
(303) 297-9171  
Attorneys for Amicus

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32(e)

---

I certify that the foregoing brief is double-spaced (excluding footnotes, quotations and headings); is printed using a proportionately spaced 14 point Courier New typeface; and includes not more than 4,200 words (not including the table of contents, table of authorities, and relevant certificates).



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Jeff Joseph

No. 03-70244

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**JAIME PEREZ-ENRIQUEZ,**  
Petitioner,

v.

**JOHN ASHCROFT, Attorney General,**  
Respondent.

---

**ON PETITION FOR REVIEW OF AN ORDER OF THE  
BOARD OF IMMIGRATION APPEALS**

---

**RESPONDENT'S OPPOSITION  
TO PETITIONER'S SECOND PETITION FOR PANEL REHEARING  
AND FOR REHEARING EN BANC**

---

**INTRODUCTION AND BACKGROUND**

A panel of this Court originally denied the petition for review on September 9, 2004. *Perez-Enriquez v. Ashcroft*, 383 F.3d 994 (9<sup>th</sup> Cir. 2004). At that time, the panel held that petitioner did not adjust status to that of a lawful permanent resident under the Special Agricultural Worker ("SAW") provisions of 8 U.S.C. § 1160 at the time he was granted temporary resident status on November 10, 1998. Rather, the SAW statute establishes his adjustment to lawful permanent

residence on December 1, 1990. Consequently, the panel concluded, petitioner's February 27, 1989, controlled substance conviction rendered him inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II), and subject to removal, as an "alien who at the time of entry or adjustment of status was within one or more classes of aliens inadmissible." Petitioner filed a Motion For Reconsideration And Rehearing En Banc challenging the Court's statutory interpretation. The respondent opposed reconsideration and rehearing en banc.

On June 14, 2005, the Court withdrew its original opinion, denied the petition for reconsideration and rehearing, and filed a new, superceding, opinion. *Perez-Enriquez v. Gonzales*, 411 F.3d 1079 (9<sup>th</sup> Cir. 2005). The Court reached the same conclusion. However, instead of simply deferring to the government's interpretation of the SAW statute under *Chevron, U.S.A. Inc. V. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court supported its conclusion through more detailed statutory construction of the two-step process for adjustment contained in the SAW statute and its recognition that utilizing the later (December 1, 1990) date of adjustment to lawful permanent resident status is "consistent with the fact that the benefits accorded a lawful permanent resident are far broader than those accorded a temporary resident." 411 F.3d at 1082-83. In so ruling, the Court agreed with the arguments presented by respondent in opposing

reconsideration and rehearing en banc. *See* Respondent's Opposition at 7-12.

Petitioner has again petitioned for rehearing en banc. As before, the panel decision presents no misapprehension of fact or law, intra- or inter-circuit conflict, or conflict with U.S. Supreme Court precedent. We urge the Court not to countenance the practice in this case of serial rehearing petitions to either repeat arguments previously made or to present new arguments that could have been previously presented to the Court, but were not. Respondent urges the Court to deny this second rehearing petition for the same reasons it denied the first rehearing petition and, as discussed below, for an additional reason.

### **STATEMENT OF THE ISSUE**

Whether the panel erred when it overlooked the issue of petitioner's eligibility for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

### **STATEMENT OF THE CASE**

Respondent hereby incorporates in its entirety its December 20, 2004, "Opposition To Petitioner's Motion For Reconsideration And For Rehearing En Banc."

## **ARGUMENT**

### **I. Eligibility For A Waiver Of Inadmissibility Under Section 212(c) Has Never Been An Issue In This Case**

Petitioner's second rehearing petition raises only one new argument. He claims that the panel of this Court "has overlooked the issue of petitioner's eligibility for 212(c) relief." Petition at 2. He contends that he requested a waiver of inadmissibility under section 212(c) before the immigration judge and that the immigration judge "held that Mr. Perez-Enriquez is not eligible for 212(c) relief." *Ibid.* Petitioner fails to explain why this contention was not presented in his first rehearing petition. In any event, the first statement is incorrect, the second is misleading, and both should be rejected.

During his immigration proceedings, petitioner filed a Motion To Terminate claiming that because he adjusted to lawful permanent resident status under the SAW statute on November 10, 1988, he was not "an alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time and deportable." 8 U.S.C. § 1227(a)(1)(A). This was the charge of deportability brought against petitioner. Administrative Record ("A.R.") 97. He based this argument on the fact that he was granted temporary status under SAW on November 10, 1988, before being

convicted of a controlled substance violation on February 27, 1989. A.R. 101.

Accordingly, petitioner denied the charge of inadmissibility brought against him and sought to have his proceedings terminated. The motion to terminate made no reference whatsoever to relief under section 212(c), and indeed, a denial of the charge of inadmissibility, without more, is wholly inconsistent with an application for a waiver of that ground of inadmissibility. (While a waiver might have been sought as an alternative to the denial of his motion, it was not.).

During none of his immigration hearings did petitioner in any way suggest an intent to apply for a section 212(c) waiver. *Generally* A.R. 40-61. During the August 7, 2001, hearing the immigration judge acknowledged the motion to terminate and petitioner's denial of the charge of inadmissibility. No mention was made of section 212(c). On August 21, 2001, the immigration judge denied the motion to terminate, found that petitioner's adjustment by operation of law to lawful permanent resident status under the SAW statute did not constitute a waiver or estoppel of the government's ability to remove him under 8 U.S.C.

§ 1227(a)(1)(A), and ordered him removed to Mexico. A.R. 33-35. In the penultimate paragraph of his decision, the immigration judge stated that "[t]he respondent has not requested any other form of relief. And I find since the respondent did not properly attain lawful permanent residence status,

notwithstanding it being recorded in 1990, that he is not eligible for relief as a long term permanent resident under *Monet v. INS*, 791 F.2d 752 (9<sup>th</sup> Cir. 1986).”

A.R. 35.

In his Notice of Appeal to the BIA, petitioner asserted that the immigration judge erred in denying the motion to terminate, and that *Monet* was inapplicable.

A.R. 25. Again, he denied the charge of inadmissibility. He did not contend that the ground of inadmissibility should have been waived. The BIA affirmed the immigration judge. A.R. 2. Petitioner’s Opening Brief to this Court on petition for review from the decision of the immigration judge makes no reference to a waiver under section 212(c), or eligibility for such a waiver. One argument in his Opening Brief, however, is insightful. Petitioner argued that the immigration judge erred in applying *Monet*, but he placed that error, not in the context of the denial of a waiver under section 212(c), but in the context of the contention that the immigration judge “incorrectly found that the Petitioner failed lawfully to attain temporary and permanent resident status under” the SAW statute.<sup>1</sup> Opening

---

<sup>1/</sup> Petitioner now contends that the immigration judge’s reference to “relief as a long term permanent resident under *Monet*” indicates a clear reference to a section 212(c) waiver. Petition at 2, n.1. But the immigration judge’s statement follows immediately upon his finding that “respondent has not requested any other form of relief.” A.R. 35. It may be that the immigration judge was merely giving petitioner the benefit of the doubt. The undisputed fact, however, is that petitioner never applied for a section 212(c) waiver. The question resolved by the

Brief at 15.

Similarly, petitioner's first rehearing petition makes no reference to a waiver under section 212(c), or his eligibility for such a waiver of inadmissibility. The first rehearing petition does not even reference *Monet*.

As a consequence of the foregoing, the Court should decline to consider on a second petition for rehearing petitioner's eligibility for a waiver under section 212(c). *Squaw Valley Development Co. V. Goldberg*, 395 F.3d 1062, 1064 (9<sup>th</sup> Cir. 2005)(rejecting an argument because it was raised for the first time on a petition for rehearing); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9<sup>th</sup> Cir. 1992)(citations omitted)("Ordinarily, arguments not timely made are deemed waived. This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing."). It is indisputable that petitioner did not apply for a waiver under section 212(c), or demonstrate his eligibility for a waiver. The Court should not permit him to do so for the first time in a second petition for rehearing.

---

immigration judge was whether petitioner was convicted before achieving lawful permanent resident status such that he could be found inadmissible under 8 U.S.C. § 1227(a)(1)(A). *Monet* addressed the question whether an alien was lawfully admitted for permanent residence. 791 F.2d at 753. It is equally possible that the immigration judge merely cited *Monet* by analogy. In any event, the fact remains that the immigration judge had before him petitioner's denial of the ground of inadmissibility, not petitioner's application for a waiver of inadmissibility.

## **II. The Remainder Of The Petition Merely Repeats Arguments Made In The First Rehearing Petition And Should Be Rejected By The Court**

Respondent's December 20, 2004, Opposition addressed petitioner's remaining arguments, and it is herein incorporated by reference. The question whether petitioner obtained permanent resident status before his controlled substance conviction took place, the fundamental issue in this case, has now twice been laid to rest by the panel of this Court. Notably, the second rehearing petition does not address or take issue with the individual findings of the panel to support its conclusion that petitioner did not adjust status for purposes of the SAW statute until he adjusted to lawful permanent resident status on December 1, 1990. Petitioner does not dispute the panel's findings that the SAW statute creates a two-step process which permits the government time to investigate the application and, in this case, the controlled substance conviction. Petitioner does not dispute that the broader benefits conferred upon a lawful permanent resident justify using the date of that adjustment as the operative date in this case.

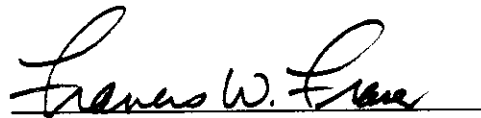
## CONCLUSION

For the foregoing reasons, the panel's determination that the SAW statute establishes that the date of petitioner's adjustment to lawful permanent resident status as December 1, 1990, is, once again, correct and should not be disturbed. The issue of eligibility for a section 212(c) waiver is not properly before the Court. The Court should deny the petition for rehearing.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General  
Civil Division

DONALD E. KEENER  
Deputy Director



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Dated: September 8, 2005

Attorneys for Respondent

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-1 or 40-1, the attached petition for panel rehearing is:

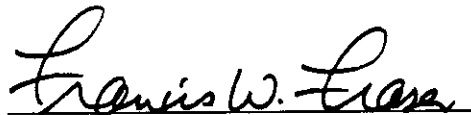
  x   Proportionately spaced, has a typeface of 14 points or more and contains 1881 words (petitions and answers must not exceed 4,200 words).

**or**

       Monospaced, has 10.5 or fewer characters per inch and contains        words or        lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

       In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.



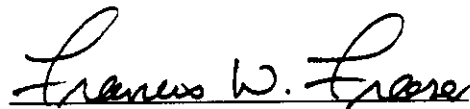
FRANCIS W. FRASER  
Senior Litigation Counsel  
Office of Immigration Litigation  
Civil Division  
U.S. Department of Justice

**CERTIFICATE OF SERVICE**

I certify that on September 8, 2005, I served one copy **Respondent's**  
**Opposition To Petitioner's Second Petition For Panel Rehearing And For**  
**Rehearing En Banc** on Petitioner by Federal Express addressed:

Robert Pauw, Esq.  
Gibbs Houston Pauw  
1000 Second Avenue, Suite 1600  
Seattle, WA 98104

Jeff Joseph, Esq.  
American Immigration Lawyers Association  
1 Broadway, Suite A235  
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FRANCIS W. FRASER  
Senior Litigation Counsel  
Office of Immigration Litigation  
Civil Division  
United States Department of Justice



No. 03-70244

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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residence on December 1, 1990. Consequently, the panel concluded, petitioner's February 27, 1989, controlled substance conviction rendered him inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II), and subject to removal, as an "alien who at the time of entry or adjustment of status was within one or more classes of aliens inadmissible." Petitioner filed a Motion For Reconsideration And Rehearing En Banc challenging the Court's statutory interpretation. The respondent opposed reconsideration and rehearing en banc.

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Whether the panel erred when it overlooked the issue of petitioner's eligibility for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

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notwithstanding it being recorded in 1990, that he is not eligible for relief as a long term permanent resident under *Monet v. INS*, 791 F.2d 752 (9<sup>th</sup> Cir. 1986).” A.R. 35.

In his Notice of Appeal to the BIA, petitioner asserted that the immigration judge erred in denying the motion to terminate, and that *Monet* was inapplicable. A.R. 25. Again, he denied the charge of inadmissibility. He did not contend that the ground of inadmissibility should have been waived. The BIA affirmed the immigration judge. A.R. 2. Petitioner’s Opening Brief to this Court on petition for review from the decision of the immigration judge makes no reference to a waiver under section 212(c), or eligibility for such a waiver. One argument in his Opening Brief, however, is insightful. Petitioner argued that the immigration judge erred in applying *Monet*, but he placed that error, not in the context of the denial of a waiver under section 212(c), but in the context of the contention that the immigration judge “incorrectly found that the Petitioner failed lawfully to attain temporary and permanent resident status under” the SAW statute.<sup>1</sup> Opening

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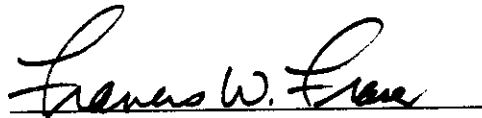
## CONCLUSION

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Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General  
Civil Division

DONALD E. KEENER  
Deputy Director



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(202) 305-0193

Dated: September 8, 2005

Attorneys for Respondent

## **CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Circuit Rule 35-1 or 40-1, the attached petition for panel rehearing is:

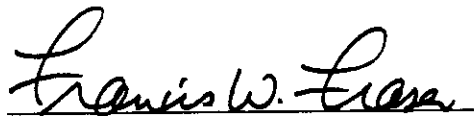
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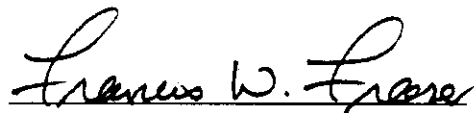
FRANCIS W. FRASER  
Senior Litigation Counsel  
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**CERTIFICATE OF SERVICE**

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**Rehearing En Banc** on Petitioner by Federal Express addressed:

Robert Pauw, Esq.  
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